Supreme Court, U.S.
FILED
OCT 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-506

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF NEW JERSEY,

Petitioner,

vs.

LINDA DELUCA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of New Jersey

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PETITIONER'S REPLY BRIEF

W. CARY EDWARDS
Attorney General of New Jersey
RICHARD J. HUGHES JUSTICE COMPLEX
Trenton, New Jersey 08625
(609) 292-9086

LARRY R. ETZWEILER
Attorney of Record

LARRY R. ETZWEILER
LINDA K. CALLOWAY
Deputy Attorneys General
Division of Criminal Justice

Of Counsel &
on the Reply Brief

October 30, 1987

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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STATEMENT OF THE CASE

Petitioner State of New Jersey relies upon its Statement of the Case as set forth in its petition for *certiorari*. This brief, submitted pursuant to Rule 22.5, replies to respondent's brief in opposition.

PETITIONER'S REPLY

In her brief in opposition to the petition for *certiorari*, respondent makes no attempt to refute that this Court's opinion in *Illinois v. Vitale*, 447 U.S. 410, 421 (1980), has engendered substantial confusion in the state and federal courts. Petitioner State of New Jersey submits that the divergent case law in this area, which contributed to the erroneous holding of the Supreme Court of New Jersey in this case, by itself warrants the granting of a Writ of *Certiorari* by this Court.[1]

Respondent contends, however, that the judgment of the Supreme Court of New Jersey is not a "final judgment" within the meaning of 28 U.S.C. sec. 1257 and that the judgment of the Supreme Court of New Jersey rested on adequate and independent state grounds. These allegations of jurisdictional bars to this Court's review are responded to herein.

1. The Judgment of the Supreme Court of New Jersey Is Final.

Noting that the New Jersey Supreme Court remanded this matter for further proceedings,

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[1] In this regard, it is noteworthy that the Illinois Supreme Court, in a virtually identical case, has recently noted this ongoing confusion emanating from *Illinois v. Vitale* and has reached the opposite conclusion from that reached by the Supreme Court of New Jersey. *People v. Jackson*, No. 63960 (Ill. Sup. Ct. October 5, 1987) (WESTLAW IL-CS Database).

respondent claims that its judgment is not final and this Court has no jurisdiction under 28 U.S.C. sec. 1257. The petitioner State of New Jersey disagrees. The federal question presented has been finally resolved by the State's highest court. There is no risk that other, unrelated questions will require a second review at a later date. Immediate review is necessary because the state supreme court's erroneous interpretation of the double jeopardy clause expressly compelled a revision in both the allocation of jurisdiction among New Jersey trial courts and the method of prosecution in future cases; this erroneously compelled revision, however, will be unreviewable in future cases. It is, moreover, unlikely that a remand will make it unnecessary for this Court to decide the federal question.

The holding of the New Jersey Supreme Court that *Illinois v. Vitale*, 447 U.S. 410 (1980), affords greater protection against double jeopardy than *Blockburger v. United States*, 284 U.S. 299 (1932), resulted in two consequences. First, the State was afforded a remand in this case after which the State would be permitted to prosecute respondent for DWI if and only if an examination of the evidence adduced at the earlier trial divulged that the State had presented evidence other than intoxication in its efforts to prove the element of recklessness to establish respondent's guilt for death by auto. Second, in order to avoid this problem in future cases, the New Jersey Supreme Court utilized respondent's case to issue what respondent refers to as a "directive" (Respondent's Brief in Opposition to Petition, at p. 8) and what in fact was an order that henceforth, the superior court must assert jurisdiction over charges of death by auto

and transactionally related charges of DWI, and that both charges are to be joined for a single trial in the superior court. (See App. A, at pp. 13a-14a). Previously, in accordance with legislative policy and the allocation of jurisdiction among New Jersey trial courts, the crime of death by auto was to be tried in the superior court, and the DWI charge was to await subsequent trial in the inferior municipal court. (See Respondent's Brief in Opposition to Petition, at p. 4, noting this policy as enunciated in a court directive). In sum, the New Jersey Supreme Court's erroneous construction of the double jeopardy clause resulted in not only an unnecessary remand in this case, but also a change in allocation of trial court jurisdiction and the way in which future cases involving DWI and death by auto would be prosecuted. Under these circumstances the New Jersey Supreme Court's judgment was "final" within the meaning of 28 U.S.C. sec. 1257.

This Court has steadfastly refused to construe 28 U.S.C. sec. 1257 in a mechanical fashion and has, instead, employed "pragmatic," common sense principles to determine whether a state court judgment is "final." *Pennsylvania v. Ritchie*, ___ U.S. ___, 107 S. Ct. 989, 998 n.8 (1987); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). This "Court has recurringly encountered situations in which the highest court of a State has finally determined the federal issue present in a particular case," and has exercised *certiorari* jurisdiction, even though "there are further proceedings in the lower state courts to come." *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469, 477 (1975). A usual, but not indispensable prerequisite to the exercise of *certiorari* jurisdiction in these cases

is that the additional state "proceedings [will] not require the decision of other federal questions that might also require review by the Court at a later date." *Id.* This case meets this prerequisite because the only federal issue ever presented in this case has been whether the double jeopardy clause does or does not permit respondent's trial for DWI following her trial for death by auto.[2]

In *Cox Broadcasting Corporation v. Cohn*, this Court enumerated four exemplary, but not exhaustive classes of cases in which the judgment of a State's highest court would be deemed "final" notwithstanding the court's order for further proceedings. This case falls into the fourth category in that "the federal issue has been finally decided," the remanded proceedings

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[2] Respondent contends that this prerequisite is not met in this case because, if the State prevails on the remand—that is, if it is established that evidence of recklessness beyond respondent's mere intoxication was adduced at respondent's earlier trial for death by auto—then she may raise the "issues of prosecutorial vindictiveness, collateral estoppel and violation of due process." (Respondent's Brief in Opposition to Petition, at p. 13). These issues allegedly will arise because in the municipal court, the State consented to the dismissal of the complaint charging respondent with reckless driving but did not consent to dismissal of the DWI charge. As respondent herself almost concedes (*id.* at p. 4), her double jeopardy claim is much stronger with respect to reckless driving than DWI. Moreover, even if convicted for both reckless driving and DWI, respondent likely would be sentenced only for DWI. (See *id.* at pp. 21-22). Under these circumstances respondent's suggestion that the State is acting vindictively or violating her due process rights simply because it has acquiesced in dismissal of the reckless driving complaint, but refuses to acquiesce in dismissal of the DWI charge is manifestly frivolous. There is no reasonable likelihood that this Court would ever be called upon to review this claim.

might moot the federal issue, reversal of the state court would be "preclusive" of any further litigation on the federal defense, and a "refusal immediately to review the state court decision might seriously erode federal policy." 420 U.S. at 482-83. This last standard is met in this case because there is a federal policy against erroneous federal intrusion into the state's operation of its trial court system. The New Jersey Supreme Court's erroneous construction of the double jeopardy clause has forced the Superior Court of New Jersey to assume trial jurisdiction over DWI cases and has changed the way in which prosecutors must, in the future, handle cases involving DWI and death by auto. The state supreme court's error warrants correction by this Court, but that correction must come, if ever, in the present case. In future cases where DWI and death by auto are joined for a single trial, New Jersey policy will be thwarted by the erroneous construction of *Illinois v. Vitale*, but the State's contentions concerning the appropriate construction will not arise for *certiorari* review for the simple reason that the joined proceedings will obviate all double jeopardy issues. If this Court is to correct this erroneously mandated joinder, it must do so immediately in this case.

It is, moreover, unlikely that a remand will make it unnecessary for this Court to decide the federal question in this case. See *Cox Broadcasting Corporation v. Cohn*, 420 U.S. at 479-80. The remand will result in one of two results. Either respondent will prevail, or the State of New Jersey will prevail.

If respondent prevails—that is, if the state courts determine that the double jeopardy clause bars respondent's trial for DWI—then clearly the federal

issue will remain for determination by this Court. At that juncture the state judiciary will have determined that respondent's trial for DWI is barred exclusively because of the greater protection afforded by *Illinois v. Vitale* which is not afforded by *Blockburger v. United States*. Whether this greater protection actually exists is the question presented in the petition for *certiorari*. Respondent contends that if she prevails on the remand, then "the State's position becomes meritless." (Respondent's Brief in Opposition to Petition, at p. 11). Respondent's contention defies logic. Whether the State's position does or does not have merit can be resolved only by this Court, but the degree of merit would not at all be diminished by respondent's prevailing at the remand proceedings.

The remaining possibility is that the State would prevail. Respondent refers to the State's proffer of proofs of recklessness (other than intoxication) as "specious allegations" (Respondent's Brief in Opposition to Petition, at p. 6), and apparently considers it so unlikely that the State will prevail that she does not discuss this possibility in her mootness analysis. More important, in the state court proceedings respondent argued in favor of a flexible, non-mechanical, quasi-transactional construction of the double jeopardy clause (Respondent's Brief and Appendix, filed in the Appellate Division of the Superior Court of New Jersey, at pp. 10-11; Brief and Appendix of Defendant-Respondent in Opposition to Petition for Certification filed in the Supreme Court of New Jersey, at pp. 4-5), and the Appellate Division of the Superior Court of New Jersey seemingly agreed with the respondent (App. E, at pp. 31a-32a), although the Supreme Court of New Jersey did not. Under

respondent's argument a remand would have been unnecessary since, regardless of the proof adduced at the first trial, respondent's trial for DWI would be barred. Respondent has not eschewed reliance upon this argument and will likely seek to preserve it in the event the State prevails at the remand hearing. However, her "flexible" construction has been rejected by the State's highest court and, as a practical matter, review should occur in this Court.[3] See *Pennsylvania v. Ritchie*, 107 S. Ct. at 997 n.7. That review would of necessity implicate petitioner's construction of *Illinois v. Vitale* and its impact upon *Blockburger v. United States*, *i.e.*, the question presented in this petition would again be before the Court.

For these several reasons the petitioner State of New Jersey submits that the judgment of the Supreme Court of New Jersey is final.

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[3] If respondent chose to seek collateral review from the federal judiciary, *e.g.*, by means of petition for habeas corpus, that choice would still bring this case within the domain of this Court's appellate jurisdiction. Moreover, for two reasons, the possibility that the federal question might be mooted by respondent's trial and acquittal does not justify avoiding review at this time. First, the evidence against respondent is overwhelming and she is not likely to be acquitted. (App. A, at p. 20). See *Cox Broadcasting Corporation v. Cohn*, 420 U.S. at 479; *Mills v. Alabama*, 384 U.S. 214, 217-218 (1966). Second, the double jeopardy clause is designed to avoid the cost and anxiety of a second trial, and not simply the possibility of a conviction following that trial. Hence, review of respondent's claim should occur in a pretrial, rather than post-trial, context. *Abney v. United States*, 431 U.S. 651 (1977).

2. The Opinion of the Supreme Court of New Jersey Rested Upon the Double Jeopardy Clause of the Federal Constitution as Judicially Construed By This Court.

Respondent contends that the opinion of the New Jersey Supreme Court rested on adequate and independent state grounds, that is, Article I, Paragraph 11 of the New Jersey Constitution and hence, this Court is without jurisdiction to review the state supreme court's judgment. (Respondent's Brief In Opposition to Petition, at pp. 13-14.) The state supreme court's opinion itself belies this allegation. The decision was based upon *Illinois v. Vitale*, 447 U.S. 410 (1980), and involved an analysis of *Vitale* and other opinions of this Court construing the Double Jeopardy Clause. (App. A, at pp. 3a-10a). Therefore, the New Jersey Supreme Court's opinion, at a minimum, "fairly appears to rest primarily on federal law, or to be interwoven with the federal law. . . ." *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). Moreover, there is no "clear and express" statement that the decision is based upon an adequate and independent state law ground, *id.* at 1041-42, as the state supreme court has consistently interpreted the state constitutional provision co-extensively with the Double Jeopardy Clause. (App. A, at p. 3a). Hence, this Court should conclude that no such grounds exist in this case. *Michigan v. Long*, 463 U.S. at 1042. Further, a request to the state court for clarification, "disfavored" since *Michigan v. Long*, 463 U.S. at 1042 n.7, is not warranted. Absent a "plain statement," jurisdiction reposes in this Court. *Id.* at 1044.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the petition, it is respectfully submitted that the petition for a Writ of *Certiorari* should be granted.

Respectfully submitted,

W. CARY EDWARDS
Attorney General of New Jersey
Attorney for Petitioner

By /s/ LARRY R. ETZWEILER
LARRY R. ETZWEILER
Deputy Attorney General
Attorney of Record

LARRY R. ETZWEILER
LINDA K. CALLOWAY
Deputy Attorneys General
Division of Criminal Justice
Appellate Section

Of Counsel and on the Reply Brief